2005), cert. denied, 126 S. Ct. 1121 (Jan. 9, 2006) (No. 05-356). A writ of certiorari is likewise unwarranted here.

1. a. The court of appeals properly held that a federal employee who is not satisfied with the amount of damages awarded in an administrative decision under the Rehabilitation Act (which incorporates by reference the cause of action in Title VII) may not seek de novo review of that decision in district court limited solely to the issue of damages. Although federal employees "aggrieved by" an administrative decision (either in whole or in part) may bring a "civil action" in district court, 42 U.S.C. 2000e-16(c), the court may provide a remedy only "[i]f *the court* finds" that the defendant has unlawfully discriminated, 42 U.S.C. 2000e-5(g)(1) (emphasis added).[2] Thus, as the court of appeals correctly recognized, the language of Title VII (incorporated into the Rehabilitation Act) "contemplate[s] that a judicial remedy must depend on judicial[—]not administrative—findings of discrimination, and no other statutory language suggests that this requirement should change if a claimant does in fact present an administrative finding

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[2] That provision provides, in relevant part:

> (g) Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders
>
> (1) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay * * * , or any other equitable relief as the court deems appropriate.

42 U.S.C. 2000e-5(g)(1).

of liability to the court." Pet. App. A10. Under petitioner's theory that administrative findings of discrimination are binding in a civil action in which the employee challenges only the administrative remedy he received, "judicial * * * findings of discrimination" would not only be unnecessary but precluded. That result is contradicted by the plain language of the statute.

Petitioner's position is also inconsistent with this Court's decision in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976). *Chandler* demonstrates in at least three additional ways that federal employees may not pick and choose among favorable and unfavorable findings in the administrative process by seeking limited de novo review of the remedies awarded while simultaneously treating prior liability findings as conclusive in district court. First, *Chandler* states that the civil action authorized by Section 2000e-16(c) is a "trial *de novo*." *Id.* at 846. That term is generally understood to encompass a new trial on the merits of the entire case, in which a court is not bound by prior findings. See *id.* at 853-854, 861 (referring to trial de novo as "plenary trial[]" and rejecting a reading of the term "civil action" that would permit "fragmentary *de novo* consideration of discrimination claims where appropriate") (internal quotation marks omitted); *Timmons* v. *White*, 314 F.3d 1229, 1233 (10th Cir. 2003) (citing definitions of "trial de novo" in cases and *Black's Law Dictionary* 1512 (7th ed. 1999)); Pet. App. A10. Second, *Chandler* makes clear that Section 2000e-16(c) "accord[s] a federal employee the same right to a trial *de novo* as private-sector employees enjoy under Title VII." 425 U.S. at 864; accord Pet. App. A7. That principle would be undermined if federal employees could treat the favorable components of administrative decisions as binding in district court and liti-

gate only the unfavorable determinations, because private plaintiffs do not typically obtain any administrative resolution of their claims prior to arriving in district court and thus must litigate both liability and remedy.

Third, allowing federal employees to seek review in district court limited solely to damages would be inconsistent with the *Chandler* Court's statement that "[p]rior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial *de novo*." 425 U.S. at 863 n.39. See *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 112-113 (1991) (citing *Chandler* for proposition that "[a]dministrative findings with respect to the * * * claims of federal employees enjoy no preclusive effect in subsequent judicial litigation"). As the court of appeals recognized, "[i]f agency decisions were intended to have any binding effect, the Court's observation [that such administrative findings may be admitted as evidence] would have been superfluous." Pet. App. A11.

b. Petitioner makes several attempts (Pet. 7-16) to overcome the plain language of Title VII and *Chandler*. None has any merit. He argues first that requiring a federal employee seeking enhanced damages to face a trial de novo of the entire case "would tend to undermine the remedial scheme of [the statute]," under which EEOC decisions are binding on federal agencies, Pet. 12, and allow agencies to force employees into court simply by awarding "ridiculously low" compensatory damages. Pet. 13. But the de novo nature of the trial available under the Rehabilitation Act does nothing to undermine the EEOC's authority or to force employees into court because the employee always has the option of appealing an agency's award of damages to the EEOC,

see 29 C.F.R. 1614.401(a), and the EEOC's decision is *binding* on the agency, unless *the employee* decides to file a lawsuit, 29 C.F.R. 1614.504(a). It is petitioner here who circumvented the EEOC by choosing to file an action in district court, rather than appeal the agency's award of damages to the EEOC. Most importantly, in making his statutory argument, petitioner never even addresses the statutory language, quoted above, that requires a *judicial* finding of discrimination in order to obtain judicial remedies. See 42 U.S.C. 2000e-5(g)(1) (reproduced in note 2, *supra*).

Next, petitioner contends that the court of appeals misread *Chandler*'s statement that "[p]rior administrative findings made with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal sector trial *de novo*." *Chandler*, 425 U.S. at 863 n.39 (quoted in Pet. 13-14). Petitioner asserts (Pet. 14) that the court of appeals was wrong to read that statement to indicate that administrative findings are not binding on a federal court because, by also stating that "many potential issues can be eliminated * * * in the course of pretrial proceedings," 425 U.S. at 863 n.39, the *Chandler* Court suggested that administrative findings may be treated as binding in motions for summary judgment. That reading of *Chandler* is untenable. If the liability findings have preclusive effect at the pretrial stage, then there would be no basis for litigating liability at a trial de novo and treating the liability findings merely as "evidence."

2. Petitioner asserts (Pet. 7) that the circuits are divided on the question presented. That is incorrect.

There is a consensus among the courts of appeals that have recently addressed the question that federal employees who have obtained favorable liability findings

in the administrative process under Title VII (or the Rehabilitation Act) may not seek de novo review in district court limited solely to the question of damages. In addition to the decision by the Third Circuit below, the Fourth, Tenth, Eleventh, and District of Columbia Circuits have recently issued published decisions holding that federal employees who have prevailed in the administrative process under Title VII may not tailor a civil action in federal court solely to a request for enhanced remedies. See *Laber* v. *Harvey*, No. 04-2132, 2006 WL 348289 (4th Cir. Feb. 16, 2006) (en banc); *Ellis* v. *England*, 432 F.3d 1321 (11th Cir. 2005) (per curiam); *Scott* v. *Johanns*, 409 F.3d 466 (D.C. Cir. 2005), cert. denied, 126 S. Ct. 1121 (2006); *Timmons*, *supra*. No court of appeals (or district court) has rejected or even questioned the analysis in these decisions, and this Court recently denied a petition for certiorari on the same question presented here in *Scott*. 126 S. Ct. 1121 (2006).

Petitioner thus relies exclusively (Pet. 4, 7) on claims of conflict with older decisions in various circuits. However, a close examination of these cases reveals no conflict. The conflict that the petition suggests between the decision below and the Fourth Circuit's decisions in *Morris* v. *Rice*, 985 F.2d 143 (1993), and *Pecker* v. *Heckler*, 801 F.2d 709 (1986), was recently resolved by the Fourth Circuit itself, which expressly overruled both *Morris* and *Pecker* in the en banc decision in *Laber*, *supra*. Indeed, the Fourth Circuit expressed its agreement with the decision below and held that "in order properly to claim entitlement to a more favorable remedial award, the employee must place the employing agency's discrimination at issue." *Laber*, 2006 WL 348289, at *12.

Petitioner's reliance (Pet. 4) on *Moore* v. *Devine*, 780 F.2d 1559 (11th Cir. 1986), is also misplaced. The Eleventh Circuit recently stated that other circuits had erred in reading *Moore* "to allow fragmentary *de novo* review of suits brought, not to enforce an EEOC decision, but rather seeking *de novo* review of that decision." *Ellis*, 432 F.3d at 1325. The Eleventh Circuit unequivocally stated that "we do not read *Moore* as permitting such fragmentary *de novo* review," and held that federal employees may not bring suit under the Rehabilitation Act seeking solely to challenge the amount of damages awarded in the EEOC administrative process. *Ibid.*

Petitioner's reliance (Pet. 4) on *Girard* v. *Rubin*, 62 F.3d 1244 (9th Cir. 1995), is similarly unavailing. *Girard* did not hold that liability findings in an administrative decision are binding in a damages-only trial in district court; it held only that the government waived a timeliness defense by failing to appeal a prior (and separate) EEOC decision that the complaint was filed within the statute of limitations. *Id.* at 1247. Indeed, in an unpublished decision, the Ninth Circuit underscored the limited reach of *Girard* while affirming a district court holding that a jury was not bound by prior administrative findings favorable to a plaintiff in a "trial de novo" under Title VII. See *Friel* v. *Daley*, No. 99-15733, 2000 WL 1208197, at *1 (Aug. 24, 2000) (230 F.3d 1366 (Table)) ("It is one thing to say that the government loses an affirmative defense by failing to appeal an adverse administrative ruling; it is far different to say that the plaintiff is relieved of proving all the elements of his claim."). Likewise, in a recent published decision, the Ninth Circuit treated the question whether administrative liability findings are subject to de novo review as an open question in that circuit. See *Farrell* v. *Principi*,

366 F.3d 1066, 1068 n.2 (2004) (comparing *Morris* v. *Rice*, *supra*, with *Timmons*, *supra*, and reserving judgment on the issue).

Finally, petitioner asserts (Pet. 4) that the court of appeals' decision in this case is in conflict with *Haskins* v. *United States Department of the Army*, 808 F.2d 1192 (6th Cir.), cert. denied, 484 U.S. 815 (1987). But in *Haskins*, the Sixth Circuit expressly noted that, where an employee seeks de novo review of his discrimination claims, "the district court is not bound by the administrative findings." *Id.* at 1199 n.4. See Pet. App. A12 (distinguishing *Haskins*).[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2006

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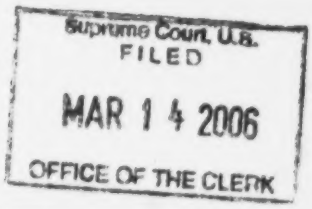
[3] While the *Haskins* court did state that "the factual findings underlying an administrative liability determination must be accepted by the district court if the plaintiff so requests," 808 F.2d at 1200, that statement was made in the context of a case in which the government "did not challenge the liability determination," *ibid.*; see *id.* at 1195 (noting that "the district court granted [the employee's] motion for partial summary judgment on the question of Title VII liability since the Army had 'admitted discrimination against the plaintiff' "). In this case, by contrast, the government has contested liability.

(3)

NO. 05-828



IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM D. MORRIS,
Petitioner

v.

DONALD H. RUMSFELD,
Secretary of Defense,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY BRIEF WITH SUPPLEMENTAL APPENDIX

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I. CONSIDERATION SHOULD BE GIVEN TO THE INTENT OF CONGRESS TO AVOID DELAY AND THE EXPENSE OF GOING TO COURT

Respondent argues that ". . . Chandler[1] makes clear that Section 2000e-16(c)[2] 'accord[s] a federal employee the same right to a trial de novo as private sector employees enjoy under Title VIII. * * * That principal would be undermined if federal employees could treat favorable components of administrative decisions as binding in the district court and litigate only the unfavorable determinations. . . ." (Respondent's Brief in Opposition, pp. 8-9)

What Respondent overlooks is that the Legislative history of 42 U.S.C. §2000e-16 reflects that in establishing an administrative procedure for resolving complaints of discrimination by Federal employees Congress was very concerned about avoiding the delay and expense associated with going to Court. See Chandler, 425 U.S. at 848-61; 96 S.Ct. at 1954-60. The Third Circuit's decision here undermines the intent of Congress to avoid that delay and expense.

This Petition for Writ of Certiorari is of interest to every Federal employee who has a complaint of discrimination pending before the EEOC or who might consider invoking the jurisdiction of the EEOC in the future.

EEOC proceedings can be very lengthy. Here, Mr.

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[1] Chandler v. Roudebush, 425 U.S. 840, 96 S.Ct. 1949, 48 L. Ed. 2d 416 (1976)

[2] 42 U.S.C. §2000e-16(c)

Morris filed a formal EEO complaint against his employer, the Defense Logistics Agency, on April 25, 1992. Administrative proceedings did not fully conclude until June 11, 2001 when the Defense Logistics Agency issued a Final Agency Decision finding Mr. Morris' compensatory damages to be $12,500. (See Petition for Certiorari at pp. 5, 6)

A Federal statute and EEOC regulations provide that any federal employee who has filed a complaint of discrimination may file a civil action in the District Court, inter alia:

> - - -After 180 days from the date of filing their complaint if an appeal to the EEOC has not been filed and final action has not been taken; or
>
> - - - After 180 days from the date of filing an appeal with the EEOC if there has been no final decision by the Commission.

42 U.S.C. §2000e-16(c); 29 C.F.R. §1614.407(b) and (d)

It has been undersigned counsel's experience in Central Pennsylvania that final action is rarely, if ever, taken by a Federal employer within 180 days of filing a formal EEO Complaint. We are sure that other counsel have had similar experiences in this area and elsewhere.

Thus, as a practical matter, we, other attorneys who practice employment law, as well as our clients and potential clients, need to know what is this Court's view as to the effect of a decision by the EEOC awarding compensatory damages?

Assuming that our clients only disagree with the "amount" of compensatory damages awarded[3],are there any circumstances when our clients can litigate the amount of their damages in the District Court without having to relitigating the issue of the employer's liability for those damages?

Senator Dominic opined that if it takes **over two (2) years** for an aggrieved employee to get a decision, that is not justice. That is not equal employment opportunity. Chandler, 425 U.S. at 856-57, 96 S. Ct. at 1957

Here, it took Mr. Morris over **nine (9) years** to complete administrative proceedings. All of that effort will go down the tubes if he is forced to relitigate everything merely because he disagrees with his employer as to the amount of the compensatory damages.

If a Federal employee cannot bind a Federal employer to the EEOC's finding of discrimination, just because the employee disagrees with the "amount" of compensatory damages awarded; then why waste valuable time and financial resources utilizing the administrative process? Why not take advantage of 42 U.S.C. §2000e-16(c) and 29 C.F. R. §1614.407 and bring a civil action in the District Court after 180 days? While that would be legal, the wholesale following of that practice by Federal employees to avoid what happened to Mr. Morris would defeat the intent of Congress, which encourages

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[3] Often the administrative judge will determine the amount of compensatory damages [See e. g. Herron v. Veneman, 305 F. Supp. 2d 64, 68 (D.D.C. 2004)] However, here the case was remanded back to Mr. Morris' employer for the employer to determine the amount.

the use of administrative proceedings by Federal employees to resolve their complaints of discrimination. Chandler, supra.

II. CLARIFICATION IS NEEDED FROM THIS COURT AS TO WHAT CONSTITUTES AN "ENFORCEMENT ACTION"

Even Respondent admits that a Federal employee can bring an action to "enforce" an Order of the EEOC without risking de novo review of the merits. (Respondent's Brief in Opposition, p. 3)

The EEOC, interpreting its own regulations, would view Mr. Morris' lawsuit as a "civil action" for "enforcement".

The Decision of the Office of Federal Operations that was entered herein states in pertinent part:

"IMPLEMENTATION OF COMMISSIONS DECISION
(KD 595)

Compliance with the Commission's corrective action is mandatory* * * If the agency does not comply with the Commission's Order, the Appellant may petition the Commission for enforcement of the Order. 29 C.F.R. §1614.503(a). The appellant also has a right to file a civil action to enforce compliance with the Commission's Order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§1614.408, 1614.409, and 1614.503(g) Alternatively, the Appellant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action". 29 C.F.R. §§1614.408 and 1614.409. A civil action for enforcement or a civil

> action on the underlying complaint is subject to the deadline stated in 42 U.S.C. §2000e-16(c) (Supp. V 1993.) * * * *" (emphasis added. (Appendix "E", p. 9)

Mr. Morris never intended to file a civil action "on the underlying complaint". Relying on the EEOC's "Notice", the suit that he brought was a "civil action for enforcement".

Clarification is needed from this Court as to what constitutes an "enforcement action." The Eleventh Circuit recently addressed this issue in Ellis v. England, 432 F. 3rd 1321 (11th Cir. 2005) Ellis has been cited by Respondent as one of several recent cases holding that Federal employees who have prevailed in the administrative process may not tailor a civil action in federal court solely to a request for enhanced remedies. (Respondent's Brief in Opposition, p. 11)

In Ellis a disabled Naval employee brought suit under the Rehabilitation Act for discrimination. The EEOC found discrimination and ordered the Navy to "consider" Ellis' compensatory damages claims. Subsequently the Navy refused to award Ellis compensatory damages and Ellis brought an action in a District Court under 42 U.S.C. 2000e-16(c) asking for a trial limited solely to the amount of his damages.

The Eleventh Circuit ruled that an Order by the EEOC for a federal employer to "consider" compensatory damages, as opposed to "awarding" compensatory damages, is not a final Order and, thus, it cannot be the subject of an enforcement action. Ellis, 432 F. 3rd at 1324-25

In contrast to Ellis, here the administrative record reflects that the EEOC did "award" compensatory damages to Mr. Morris.

The Bench Decision issued by the Administrative Judge states in pertinent part:

> "Recommended corrective action:
>
> * * * *
>
> The agency shall pay to the complainant compensatory damages based on the injuries sustained on April 11, 1992, in failing to reasonably accommodate the complainant for the period February 27, 1992 to April 11, 1992." (emphasis added)

(Appendix "D", p. 2)

The Decision of the Office of Federal Operations (OFO) states in pertinent part:

> "The agency's failure to make any attempts to find an available office position for the appellant, in spite of his repeated requests, supports the AJ's award of compensatory damages for any losses the appellant may be able to establish on remand." (emphasis added)

(Appendix "E", p. 6, f.n. 3)

And, the Decision of the OFO also contains a "Notice" that the Defense Logistics Agency was supposed to post where it could be seen by all of its employees. The "Notice" states:

> "The DDRE has been found to have denied a reasonable accommodation to an employee with a disability (arthritis/degenerative disc disease) by failing to timely reassign him from a warehouse job to an office job. As a result, the agency has been ordered by the EEOC to award the employee back pay for any missed work opportunities, and award appropriate compensatory damages and attorney's fees to the employee." (emphasis added)

(Appendix "E", pp. 14-15)

Surely the EEOC would not have used the word "award" in the context of compensatory damages if it was not its intent to actually make such award.

III. ALTERNATIVELY, THIS COURT SHOULD ADOPT A "TWO FINAL DECISIONS" RULE

The District Judge here, following Malcolm v. Reno, 129 F. Supp. 2d 1 (D.D.C. 2000), which was based on substantially similar facts, adopted a "two final decisions" rule. The Judge observed:

> "The EEOC's October 1, 1998 discrimination determination constitutes a binding agency decision. See 29 C.F.R. §1614.405. The EEOC could have, but chose not to, determine the proper measure of damages at that juncture. Rather, the EEOC remanded the issue of compensatory damages to the DLA. By final decision dated June11, 2001, the DLA awarded Morris $12,500 in compensatory damages. (Doc. 17 ¶¶ 12-13) The DLA's June 11, 2001 Order constitutes a second binding final agency decision. Id. ¶ 13. Seeking de

> novo review of the June 11, 2001, final agency decision does not place the EEOC's discrimination determination at risk of de novo review. Malcolm, 129 F. Supp. 2d at 6. Accordingly, the Court will grant plaintiff's motion for partial summary judgment on the issue of liability. (Doc. 15)" (emphasis added)

In the alternative, we urge this Court to approve that "two final decisions" rule.

Respondent recognizes that Federal agencies have no right to challenge adverse EEOC decisions in Court. (Respondent's Brief in Opposition at p. 3) Respondent even states:

"The EEOC's regulations specify that '[f]inal action that has not been the subject of an appeal or a civil action shall be binding on the agency.' 29 C.F.R. 1614.504(a)" (Id)

The "two final decisions" rule recognizes the final and binding nature of an EEOC's decision and prevents a Federal employer from obtaining a de facto challenge to the EEOC's decision in the District Court merely because the Federal employee disagrees with his or her employer's determination of the "amount" of compensatory damages.

CONCLUSION

For all of the aforegoing reasons the Petition for Writ of Certiorari should be granted.

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